IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-270

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

– and –

CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL, BISHOP LOUGHLIN MEMORIAL HIGH SCHOOL, BAIS YAAKOV ACADEMY FOR GIRLS and YESHIVAH RAMBAM,

– and –

SENATOR EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER and HOWARD M. SQUADRON,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT
ON BEHALF OF APPELLANT, SENATOR EARL W. BRYDGES

August 16, 1972

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Appellant, Senator Earl W. Brydges, as Majority Leader and President Pro Tem of the New York State Senate, appeals from the judgment of the United States District Court for the Southern District of New York, entered on June 1, 1972, permanently enjoining payments under a 1970 law of New York State to nonpublic schools, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the District Court for the Southern District of New York, on the motion to convene a three-judge District Court is reported in 322 F. Supp. 678 (1971).

The majority opinion of the District Court enjoining payments under the 1970 law of New York State and the dissenting opinion thereto are not yet officially reported. They are attached hereto as Appendix A.

Jurisdiction

This suit was brought under 28 U.S.C. §§1331, 2281, 2283, 2201 and 2202 for a permanent injunction against the allocation of funds of the State of New York to nonpublic schools to reimburse them for a portion of expenses for complying with State-mandated attendance, reporting and educational requirements. The judgment of the District Court was entered on June 1, 1972, (Appendix B hereto), and notice of appeal of Senator Earl W. Brydges, an intervenor-defendant in this action, was filed in this Court on July 14, 1972 (Appendix D hereto). The following most recent decisions sustain the jurisdiction of the Supreme Court to review judgment on direct appeal in this case: *Lemon v. Kurtzman, Earley v. DiCenso* and *Robinson v. DiCenso,* 403 U.S. 602 (1971), and *Tilton v. Richardson,* 403 U.S. 672 (1971).

Questions Presented

1. Is there a violation of the First Amendment provisions of the U.S. Constitution, with respect to "Separation of Church and State", when a state statute grants limited state funds to nonpublic schools to alleviate part of the additional financial burden imposed on them by their compliance with certain state educational requirements mandating record-keeping, examination and inspection of students attending nonpublic schools?

2. Does the "Establishment Clause" of the First Amendment of the U.S. Constitution, with respect to prohibiting laws establishing religion, stifle the will of democratic institutions

to provide minimal assistance to nonpublic schools of a secular, nonideological and neutral nature?

3. Is there a violation of the First Amendment provisions of the U.S. Constitution, with respect to Freedom of Speech, and of Articles IX and X of the U.S. Constitution, with respect to the sovereignty of the individual and of the several states, when the federal judiciary curtails the rights of legislative bodies and political institutions to a free and open debate of issues touching on religion?

Statutes Involved

Chapter 138 of the 1970 Laws of the State of New York, entitled "An Act to provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor," which is set forth in Appendix C hereto.

Statement

Appellant Senator Earl W. Brydges is the Majority Leader and President Pro Tem of the New York State Senate.

Appellants Levitt and Nyquist are, respectively, Comptroller and Commissioner of Education of the State of New York. Appellants Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School, Bais Yaakov Academy for Girls and Yeshivah Rambam are nonpublic elementary and/or secondary schools situated in the State of New York.

Appellees, allegedly taxpayers of New York State, instituted this suit on July 30, 1970 in the United States District Court for the Southern District of New York, praying, *inter alia,* that appellants Levitt and Nyquist be permanently enjoined from approving or paying any funds of the State of New York pursuant to Chapter 138 of the 1970 Laws of New York (Appendix C hereto, hereinafter referred to as "Mandated Services Act") to schools owned or controlled by religious bodies or organized or engaged in the practice or teaching of religion or which limit, or give preference in, admission or employment to persons of a particular religious faith. Appellants Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School, Bais

Yaakov Academy for Girls and Yeshivah Rambam, as beneficiaries under the Mandated Services Act, duly intervened in the suit as parties defendant pursuant to Rule 24 of the Federal Rules of Civil Procedure (FRCivP). A three-judge District Court consisting of the Hon. Paul R. Hays, U.S. Circuit Judge, Hon. Edmund L. Palmieri and Hon. Morris E. Lasker, U.S. District Judges, was duly constituted on February 24, 1971 pursuant to 28 U.S.C. §§2281, 2284. A hearing on the merits was held on April 11, 1972.

On April 27, 1972, Judge Lasker handed down an opinion (Appendix A hereto), concurred in by Judge Hays, that the Mandated Services Act "violates the establishment clause of the First Amendment." The Court reasoned, in part, as follows:

> Either the statute falls because a system of surveillance and control would create excessive entanglement, or, without such a system, the schools would be free to use funds for religious purposes. The constitution is breached whichever route is chosen.

Judge Palmieri dissented (Appendix A hereto) on the ground, among others, that

> (t) he record is uncontested that the sums appropriated by the legislature to assure attendance and adequate examination procedures are much less than the schools expend for such purposes. This provides adequate assurance that government funds are not available for examination functions peculiar to religious institutions.

On June 1, 1972, judgment was entered (Appendix B hereto) permanently enjoining the

> defendants and their agents and all persons acting for or on behalf of the State of New York . . . from making any payments or disbursements out of State funds pursuant to the provisions of Chapter 138 of the New York Laws of 1970, in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools.

Notices of appeal from the foregoing judgment to this Court have been duly filed pursuant to 28 U.S.C. §2101 (b) on be-

half of all appellants, including your appellant Senator Earl W. Brydges, (Appendix D hereto), who was permitted to intervene as a party defendant in the suit pursuant to Rule 24, FRCivP subsequent to entry of judgment.

On June 20, 1972, the three-judge District Court reconvened to hear in open court the motion of appellants Levitt, Nyquist, Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School and Senator Earl W. Brydges to suspend its injunction pursuant to Rule 62 (c), FRCivP pending appeal to this Court. After hearing all of the parties, Judge Palmieri stated orally from the bench that he would grant the motion. Judge Hays stated that he would deny the motion and leave it to this Court to determine whether a stay should be granted. Judge Lasker reserved his decision for a week. On June 28, 1972, Judge Lasker indicated that he had decided to deny the motion, whereupon Judge Hays and he signed an Order on June 29th denying appellants' motion, (Appendix E hereto).

An application by appellants to the Supreme Court, for a stay of the District Court's judgment pending a hearing and determination of the appeal, pursuant to Rule 18 of the Rules of the Supreme Court, was denied on July 17, 1972.

The Questions Are Substantial

1. THE MANDATED SERVICES AID TO NONPUBLIC SCHOOLS INVOLVES A CASE OF FIRST IMPRESSION AND IS CLEARLY AID WHICH IS "SECULAR, NEUTRAL AND NONIDEOLOGICAL" WITHIN THE SUPREME COURT GUIDELINES OF *LEMON V. KURTZMAN.*

The Mandated Services Act is unique in that it is different from any other statute in the United States. It provides reimbursement to nonpublic schools for the considerable expenses they incur in complying with the comprehensive laws and regulations of the State of New York relating to record-keeping and the examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enroll-

ment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports.

There is no decision of this Court or of any other court controlling the issues of law and fact raised in the District Court and now raised on appeal. The clearest indication of this is the incisive dissenting opinion of Judge Palmieri (Appendix A hereto).

The majority opinion of the District Court relies primarily on the decision of this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). But that decision dealt specifically with a Pennsylvania enactment providing for that state's payment of parochial schoolteachers for teaching mathematics, modern foreign languages, physical science and physical education and a Rhode Island statute providing for the payment by that state of salary supplements to parochial schoolteachers in the amount of 15 percent of their salaries. Clearly, neither law examined in *Lemon v. Kurtzman* had anything to do with the neutral, nonideological services required of, and provided by, all schools, public and nonpublic alike, and which are within the purview of the Mandated Services Act. Indeed, this Court took specific note of the fact in *Lemon v. Kurtzman* that its . . . "decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause."

This Court's decision in *Lemon v. Kurtzman* was limited to the "narrow" question before it at the time, whether public aid for the salaries of teachers in nonpublic schools involves "excessive entanglement" by public agencies in religion. This Court quite naturally observed in that case that efforts on the part of public officials to determine what portion of a teacher's salary was attributable to instruction in secular courses, as opposed to religious dogma, would result in "excessive entanglement" in religious matters. No such "entanglement" arises, however,

under the administrative procedures for making payments to nonpublic schools for "mandated services" aid under the provisions of Chapter 138 of the New York State Laws of 1970. The aid under the 1970 enactment is limited solely to partial reimbursement to the nonpublic schools for the expenses actually incurred to insure that the state's mandatory attendance requirements and minimum nonideological scholastic achievements are maintained in the nonpublic schools. In no respect are such expenses intended to reimburse such schools for teaching nonpublic school children. Instead, reimbursement is limited solely to costs of "secular, neutral and nonideological" services, mandated by New York State and of a nature which this Court recognized in the *Lemon* case as constitutional.

2. THE MANDATED SERVICES ACT IS NECESSARY TO AVERT A FISCAL CRISIS IN FINANCING EDUCATION AND OTHER GOVERNMENTAL SERVICES IN NEW YORK STATE.

During the 1970-71-72 legislative sessions, the New York State Legislature devoted particular attention to a matter of vital importance to every citizen in the State of New York—how to finance a quality education for every child in the State.

Article XI, Section 1 of the New York State Constitution charges the Legislature with the responsibility for ". . . the maintenance and support of a system of free common schools, wherein all the children of this State may be educated." For the past several years the State Legislature has been confronted with a crisis in financing the education of its children. During this period approximately 4 million pupils have been in attendance yearly in the public and nonpublic schools of the State.

The cost to the State of financing public education has risen to about $2.5 billion in 1972-73, an increase of almost $500,000,000 since 1969-70, while local school district contributions increased by a commensurate amount.

Approximately 750,000 children, 18% of all students, are currently attending State chartered and regulated, nonpublic schools at practically no cost to the taxpayer. Greatly increased

costs for parents at these nonpublic schools, coupled with the ruinous inflation of recent years and ever rising taxes to support government operations at all levels, including education, threaten a precipitous collapse of the nonpublic school system with catastrophic consequences on the public sector.

Particularly affected are city school districts often characterized by overcrowded and outdated school buildings, unsatisfactory pupil-teacher ratios and hampered by constitutional tax limits in raising funds for education. Indeed, most of these school districts have little tax margin remaining. The table below demonstrates the relationship between remaining property tax leeway, the number of nonpublic school children and the local amount from their major source of revenue that would be available to support an influx of nonpublic students into the public schools.

PROPERTY TAX REVENUE REMAINING UNDER CONSTITUTIONAL LIMITS FOR THE SUPPORT OF EDUCATION IN SELECTED CITIES*

City	1971-72 Property Tax Margin Remaining	1970-71 Nonpublic Enrollment	Amount available per pupil at local level if all nonpublic pupils were transferred to public schools
Auburn	$ 254,122	1,709	$148.69
Binghamton	175,826	2,505	70.19
Buffalo	5,528,877	32,353	170.89
Jamestown	36,826	535	68.83
New York	1,400,187	399,615	3.50
Niagara Falls	1,118	3,430	.32
Rochester	2,835,858	14,986	189.23
Syracuse	3,798	9,640	.39
Troy	896,628	3,325	269.66
Utica	664,116	5,402	122.93
Yonkers	–0–	9,946	–0–

* Table and informational data in this subdivision 2 are derived from 1972 Report of New York State Commission on the Quality, Cost and Financing of Elementary and Secondary Education, Chapter V—Aid to Nonpublic Schools.

The above city school districts have within their geographic boundaries more than 60% of all nonpublic school pupils in New York State. It is readily demonstrated from the above Table that the ability of those school districts to finance even the local share of education costs (average of $750 per pupil) would be well-nigh impossible if these students should transfer in any substantial numbers. In fact, the Table demonstrates that even a small number of transfers in certain cities—New York City, Niagara Falls, Syracuse and Yonkers—could constitute financial disaster for those areas.

The average operating costs for each public school child in New York State is approximately $1400 per year. Indeed we could argue that the magnitude of that expenditure—the highest in the nation—was made possible only by the willingness of the parents of nonpublic school children to bear an enormous tuition burden for the education of almost 750,000 children in addition to their normal tax load. Of course, the presumption here is that tax dollars are limited; and thus, the fewer the pupils, the more that can be spent on a per pupil basis for public education. This presumption is real and the financial crises that would be precipitated by attempting to maintain the present per pupil expenditure, should there be a collapse of nonpublic education, would be of shocking proportions. Consider, for example, the over $1 billion additional annual operating cost that would be necessary, and the estimated $1.4 billion added expenditure necessary to finance capital structures capable of handling this influx of children.

The enormity of such a fiscal nightmare can only be placed in perspective when one considers that this is $600,000,000 more than the entire revenue currently generated by the State sales tax and would necessitate almost doubling the State income tax. Can a State which has balanced its current budget on *anticipated* Federal revenue sharing of $400,000,000 and whose tax burden is among the highest in the country be expected to meet this added fiscal burden? Should local school districts relying on a regressive property tax, already at the confiscatory level, be asked to assume that burden? The answer is obvious. Survival of quality education is at stake.

No one will deny New York's constitutional authority to mandate certain minimal services, tests, record-keeping, health services, attendance requirements and the like in the nonpublic schools within its borders. It has done so for many years without challenge and without cost to the taxpayer. In recent years, due to inflation, labor costs and the overall increased costs of producing quality educational services in the nonpublic schools, these schools were no longer able to financially comply with the additional costs of providing for the State the required reporting and record-keeping of these mandated services. Because of this increased financial burden imposed by the State, many nonpublic schools had begun to reach the breaking point and were about to be forced to close their doors.

The Legislature, recognizing the impending calamity it was faced with, had the choices of either letting the nonpublic schools close, or eliminating the programs of mandated services, or assisting the nonpublic schools financially for their out-of-pocket expenses incurred in complying with these State mandates. The Legislature chose the latter course.

It seems anomalous to say that the Legislature can direct these private nonpublic schools to perform certain services for the State but not be able, constitutionally, to reimburse them partially for the costs of performing these services. Yet that is the substance of the decision below. Indeed, it would appear to be more of a constitutional deprivation for the State to mandate these services by private institutions without just compensation rather than for the State to reimburse them for these services.

This Court would do well to heed the advice of Professor Paul Kauper, an eminent constitutional lawyer, who concluded his lecture on "Government and Religion, the Search for Absolutes" (published in *Michigan Law Quadrangle Notes*, Vol. 15), as follows:

> "In short, the courts may in an appropriate gesture of modesty recognize that they do not have all the wisdom in these matters; that there is latitude for some play in the joints; and that in the area of church-state relations as in all other areas of public concern where policy considera-

tions loom large, it is not inappropriate to leave the determination of some issues to the operation of the democratic process."

Perhaps, the time has arrived for the resuscitation of the doctrine of "judicial self-restraint" in this area of the law, in order to leave room for states to experiment with devising more effective methods of educational achievement which is more apt to arise through competition between schools rather than by elimination of the nonpublic schools from the scene.

3. LEGISLATIVE BODIES AND POLITICAL INSTITUTIONS SHOULD NOT BE CURTAILED IN THEIR CONSTITUTIONAL RIGHT TO A FREE AND OPEN DEBATE OF ISSUES TOUCHING ON RELIGION.

The exercise of such fundamental rights as Freedom of Speech, and Expression and the reserved sovereign powers of the states are endangered by the opinion of the Federal District Court in this case.

Traditionally, state legislative bodies and other political institutions have exercised the right to free and open debate of any subject or issue no matter how politically divisive it may be on segments of our society.

The exercise of this right appears to have been curtailed by recent federal court decisions involving issues similar to those in this lawsuit. Those decisions have expressly, and by innuendo, curtailed the rights of state legislative bodies to freely and openly debate issues which are "potentially divisive." The basis of these federal court decisions is the opinion of this Court in *Lemon v. Kurtzman,* 403 U.S. 602 (1971). In that case the Court observed that:

"Ordinarily, political debate and division, however vigorous or even partisan, are normal manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.

"The potential divisiveness of such conflict is a threat to the normal political process."

This Court issued this pronouncement in declaring unconstitutional a Pennsylvania law providing public funds for teaching nonreligious courses in private schools. In so ruling the Court acknowledged its chief concern was not whether the law aided religion, but that it involved "excessive entanglement" of religion in government. This entanglement, the Court concluded, violated the First Amendment provision of separation of church and state. The Court implied that this excessive entanglement exists in the normal political activity of our legislative bodies when considering issues which peripherally touch upon a religious question.

This Court's reaction to entanglement of religion and government cannot be taken as a "passing fancy." In recent months other Federal courts have relied upon the pronouncement in the *Lemon* case to curtail efforts by various legislative bodies throughout the country to seek solutions to the fiscal plight of nonpublic schools.

For example, in March of this year a three-judge Federal Court declared unconstitutional a Vermont law which partially reimbursed public school teachers for teaching nonreligious courses in parochial schools. (*Americans United for Separation of Church and State v. Oakey,* (D.C. Vt. 1972), 339 F. Supp. 545). The court noted (at 545):

> "Any such involvement carries with it the explosive potential for citizen friction and political sub-division along religious lines."

Similar restrictions on the freedom of state legislatures to debate issues involving religious overtones was evidenced in the month of March of this year when federal courts sitting in Pennsylvania and Ohio struck down laws reimbursing parents for children's tuition payments in private schools. (See *Lemon v. Sloan,* (D.C. Pa. 1972), 341 F. Supp. 1356; *Wolman v. Essex,* U.S.D.C., SE Dist., Ohio (1972)). Particularly significant is the decision of the federal court in Ohio, which states, in part, that the plan

> ". . . contains the seeds for increased political involvement along religious lines at every level of government.

Appendix A

I.

The statute, which became effective July 1, 1970, directs the Commissioner of Education to apportion annually to nonpublic schools the sum of $27 for each pupil in average daily attendance in the first six grades and $45 for those in grades seven through twelve. The express purpose of the expenditure, as indicated above, is to compensate the schools for services "mandated" by state law or regulation of the Commissioner. These services include administration of compulsory attendance laws, Regents' examinations, and pupil evaluation program tests, as well as preparation of various reports intended to assure that minimum state educational standards are met. The services rendered are required of public and nonpublic schools alike.

The Act is construed and applied by the defendants to include as permissible beneficiaries schools which (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities ; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach. (Answer to Interrogatory 7).[2]

The beneficiary schools are required neither to account for nor return to the state any amounts received by them in excess

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[2] It should be pointed out that intervenors Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School do not impose religious restrictions on admissions or require attendance of pupils at religious activities or obedience by students to the doctrine of a particular faith; that the schools contribute to the religious mission of the sponsoring church, but they do not impose religious restrictions on faculty appointments and they place restrictions on teaching only to the extent that it not be contrary to the tenets of the sponsoring church. (Intervenors' Answers to Interrogatory 3).

of their actual expenditures for "mandated services." (Answers to Interrogatories 4, 7 and 11). This, of course, leaves a school free to expend any excess for whatever purpose it wishes, including religious or sectarian objectives.

Since the statute is predicated—and its constitutionality allegedly justified—on the ground that it merely reimburses the nonpublic schools for expenses of state-mandated services, post-enactment studies have been conducted comparing the actual cost to the schools of performing services with the amounts allocated to them by the state. The conclusions to be drawn from such reports (Exhibit D to Defendant Nyquist's Answers to Plaintiffs' Interrogatories) are cloudy. If such items as "teacher examinations" and "entrance examinations" are included in the list of "mandated services," it appears that the schools' expenses are at least as great as the amounts they receive from the state. But if those items are excluded, the amounts received from the state are substantially greater than the schools' expenses. Doubt as to which standard is properly applied is occasioned by material submitted by the Commissioner to the Board of Regents at its request which states (Exhibit G to Defendant Nyquist's Answers to Interrogatories, at p. ES 1.9):

> ". . . only the Regents Scholarship and January and June Regents Examinations might be regarded as *specifically mandated.* Inclusion of such costs only would reduce the examination figure [of $68,853] by $66,629." (Emphasis in original).

While our decision as to the constitutionality of the statute does not turn on the factual question so presented, we mention it to illustrate the lack of certainty as to the purposes for which the moneys received are actually used, or, indeed, whether they can be regarded as specifically "mandated."

Plaintiffs contend that on its face, and as applied, the statute violates the establishment clause of the First Amendment to the federal constitution, as well as Article XI, section 3, of the New York constitution, because its purpose and

primary effect is to advance religion and it gives rise to excessive governmental involvement and entanglement in religion.[3]

Defendants and intervenors argue that the statute is constitutionally justified since payments are made solely as reimbursement for the expenses of furnishing secular services mandated by the state. They contend that the Act constitutes neither sponsorship, financial support, nor active involvement in religious activity by the state and does not cause excessive entanglement of church and state. They also claim that, aside from the merits, the complaint should be dismissed for "lack of jurisdiction"[4] because the complaint raises a threshold question under the constitution of New York." This contention was exhaustively treated and rejected by the convening judge (*Committee for Public Education and Religious Liberty, et al, v. Rockefeller, et al,* 322 F.Supp. 678, 687 (S.D.N.Y. 1971)). We agree with his view that neither abstention nor dismissal for the reason suggested is appropriate here. The federal and state issues are of equal importance. The statute is unambiguous on its face, and under the rule of *Wisconsin v. Constantineau,* 400 U.S. 433 (1971), the court should "proceed to the federal constitutional claim." Furthermore, abstention is particularly unsuitable in this case because, as indicated in the convening judge's opinion (322 F.Supp. at 688), plaintiffs have no standing under New York law to litigate the state constitutional question in the New York courts. We are unim-

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[3] Plaintiffs also allege that the statute constitutes compulsory taxation in aid of religion in violation of the free exercise clause of the First Amendment. In view of that rationale by which we dispose of the case, it is unnecessary to consider this argument.

[4] Defendants state the position in their brief as follows:

"The complaint should be dismissed on the ground that the Court lacks jurisdiction over the subject matter of the action in that the complaint raises a threshold question of the constitutionality of the statute under the provisions of the constitution of the State of New York."

We assume that defendants wish us to apply the doctrine of abstention, since it is clear that the Court has jurisdiction of the First Amendment issue.

pressed by the proposal in the state's brief that we should abstain because "there is no assurance that that Court [i.e., Court of Appeals of New York] would not now reverse the position that it took in earlier cases . . ." in the light of the holding in *Flast v. Cohen*, 392 U.S. 83 (1967), that a federal taxpayer has standing to sue for constitutional violations. Nothing in the New York Court of Appeals' decisions since *Flast* encourages or supports the state's argument on this point.

II.

We come to the federal constitutional question. We are guided so clearly by the decision of the Supreme Court last term in *Lemon v. Kurtzman* and *Earley v. DiCenso*, 403 U.S. 602 (1971), that we need not review at length earlier cases which articulated constitutional limits on governmental assistance to church-supported schools. The boundaries of permissible government action in the field were set by *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Board of Education v. Allen*, 392 U.S. 236 (1968). In *Everson*, the Court upheld a New Jersey statute which reimbursed *parents* for bus fares of children attending parochial schools. However, the *Everson* Court cautioned that its decision carried to "the verge" of what Chief Justice Burger, in *Lemon*, described as the "forbidden territory under the Religion Clauses." In *Allen*, the Court found that a New York law under which the state loaned school books to *students* at parochial schools passed constitutional muster. Neither case involved a statute which, as here, grants direct subsidies to parochial schools; and in *Lemon* the Court struck down two such plans.

The *Lemon-Earley* decision dealt with Pennsylvania and Rhode Island statutes which, as here, provided for cash payments intended to assist parochial schools in the acknowledgedly grave financial crisis which faces them. The Rhode Island statute, resting on a legislative finding that the quality of education available in nonpublic schools was jeopardized by rising salaries needed to attract teachers, authorized state officials to supplement the salaries of teachers of secular subjects

in nonpublic elementary schools by direct limited payment to the teacher. The teacher was bound to teach only subjects and use only teaching materials offered in public schools, and not to teach any course in religion. Eligible schools were required to submit to the state financial data necessary to determine the propriety of payments under the Act. The Pennsylvania statute, also based on a legislative finding of rapidly rising costs in the state's nonpublic schools, authorized the Superintendent of Public Instruction to "purchase" "secular educational services" from nonpublic schools. The purchase was consummated by state reimbursement to nonpublic schools of actual expenses for teachers' salaries, text books and materials. To secure reimbursement, a school was required to follow specified accounting procedures subject to state audit. Reimbursement was limited to such secular courses as mathematics, foreign languages, physical science, and physical education, and prohibited courses that contained "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."

From this analysis it is apparent that the New York statute before us more closely resembles the Pennsylvania than the Rhode Island statute, and our decision is guided by the Supreme Court's observations as to the former. Indeed, the sole differences of substance which exist between the Pennsylvania statute and New York's mandated services law are that reimbursement was permitted under the Pennsylvania law principally for teaching, whereas here it is allowed primarily for testing; and under the Pennsylvania statute a school was required, subject to audit, to account to the state, while here the school is not. We find these distinctions insufficient to avoid the rule of *Lemon-Earley*, concluding, as did the *Lemon* Court, "that the cumulative impact of the entire relationship arising under the statute[s] . . . involves excessive entanglement between government and religion."

The *Lemon* Court's finding of excessive entanglement was based on an examination of the "character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the

government and the religious authority." *Lemon,* supra, at 615.

In the case at hand there is no question as to the character and purposes of the institutions which are benefited. No dispute exists as to the close association of the schools to the religious institutions of various faiths which support them. Indeed, the record establishes that payments are made to schools which, for example, impose religious restrictions on admissions, require attendance of pupils at religious activities, and are an integral part of the religious mission of the supporting church.

The nature of the aid provided here is precisely the same as the state aid provided by Pennsylvania in *Lemon*—that is, financial assistance paid directly to the church-related school. Even before its holding in *Lemon* that such payments violated the establishment clause, the Court had cautioned in *Walz v. Tax Commission,* 397 U.S. 664, 675 (1970):

> "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards."

The defendants here contend that the rationale of *Lemon-Earley* and the quoted *Walz* passage are inapplicable to the New York statute, which does not require, either on its face or as administered, any "detailed administrative relationship for enforcement" of the statute. It is said that, since the New York law simply does not require beneficiaries to report on their use of the funds, the vice foreseen in *Walz* and found fatal in *Lemon* does not exist here.

The argument is unpersuasive. As the *Lemon* Court commented:

> "The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance." (at 621).

We think this lesson of history is applicable here. Indeed, the gentle inquiry of the Board of Regents which caused studies to be made to determine whether the costs to the nonpublic schools for mandated services are actually as great as the amounts they receive from the state is a sort of inching in that direction. It is not unreasonable to assume that, in this day of tight budgets and taxpayer uneasiness, the dictates of sound administration, or political pressures, will likely give birth to a system of surveillance and controls intended to assure that, at the least, the state is not paying for more than it is receiving. Indeed, section 8 of the statute itself states: "Nothing contained in this Act shall be construed to authorize the making of any payment under this Act for religious worship or instruction." It is difficult to see how the Board of Regents or the Commissioner can in good faith implement the language of section 8 without sooner or later instituting the type of surveillance and controls which the *Lemon* Court found to foster excessive entanglement.

Assuming, however, that such a prognosis is unfounded, the alternative leaves the statute even more vulnerable. For if no system of audit or control is to be instituted, this will leave the schools free, as they apparently are now, to keep their shares of the apportioned moneys regardless of whether their expenses are as great as their receipts, and to use any excess for the general purposes of their religious missions. The dilemma we have outlined is insoluble. Either the statute falls because a system of surveillance and control would create excessive entanglement, or, without such a system, the schools would be free to use funds for religious purposes. The constitution is breached whichever route is chosen.

Defendants argue that the strictures of *Lemon* and *Walz* against cash payments do not apply here because reimbursement is being made for services which are "secular, neutral, or nonideological" (*Lemon*, at 616) analogous to the payments which were approved in *Everson* and *Allen*. The analogy, however, is inapposite. Bus transportation, school lunches, public health services, and secular text books (for which payment

was approved in *Everson, Allen* and other cases) are of a character entirely different from services rendered by teachers in administering tests not only developed by the state, but those developed by the schools or the teachers. By far the greatest portion of the funds appropriated under Chapter 138 is paid for the services of teachers in testing students, and testing is an integral part of the teaching process. As the Court commented in *Lemon*, "teachers have a substantially different ideological character from books." It is this fundamental distinction which makes the limited rules of *Everson* and *Allen* inapplicable. Nor does the fact that the reimbursement by New York is for "mandated services" rescue the statute. It is true, of course, that administration of tests, recording attendance of students, and compiling health records are required by the state, but so is teaching required by the state if a private school, parochial or otherwise, is to be certified as an adequate substitute for public school. It would be fanciful to suggest, however, that the state would be free to reimburse the schools for ordinary teaching expenses on the theory that the state "mandates" such services.

Even if all these observations were not true, the statute would nevertheless be constitutionally flawed. As the *Lemon-Earley* Court stated:

> "A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs." (at 622).

The Court held there that in a community with a large number of pupils served by church-related schools (surely true in the present case) it is reasonable to assume that state assistance will result in the aggravation of divisive political activity on the part of supporters and opponents of the annual appropriation legislation. The Court concluded (at 622) that ". . . political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." Measured by this standard, the New York statute suffers precisely the same constitutional defects as both the Pennsylvania and Rhode Island statutes in *Lemon-Earley*.

> . . . To uphold this statute would be to introduce the religious issue to the very center of state politics . . . the political issue will be an expansive one . . . with the result that the issue will be joined along sharply drawn religious lines."

The two judges of the Federal District Court in this case have likewise implied that restrictions are imposed on the freedom of the state legislature to debate legislation touching on religious issues. The majority decision noted that:

> ". . . it is reasonable to assume that state assistance will result in the aggravation of divisive political activity on the part of supporters and opponents."

The pronouncement of this Court in the *Lemon* case, as applied in this line of recent Federal cases, has been resorted to with devastating consequences. Underway is a dangerous trend to restrict the freedom historically enjoyed by the New York State Legislature and other legislative bodies to respond to diverse problems, which by necessity demands free and open discussion of every conceivable issue. As noted by Judge Edmund L. Palmieri in his dissent in this case:

> Government and political activity should play a part in searching ". . . for ways within the American system of public education that will preserve, indeed promote, the diversity of individual belief—religious, political and social—that, along with our Bill of Rights, distinguishes us so plainly from certain uniform, unified and uni-governed societies elsewhere in the world."

In the event that this concept curtailing legislative debate is continued in this action, no longer will legislative bodies operate as a forum for free and open discussion. Indeed there is a danger that the resolution of peculiarly volatile issues will no longer continue within the framework of our democratic process. It is submitted that the unfortunate trend that may develop from these recent federal court decisions is to encourage elements of our society to seek solutions to our social, political and economic problems in a manner that is "extra-legal."

The courts of the United States have attempted to exercise a jurisdiction so large and so great in terms of breadth and width, that sometimes those who serve in the states of the Union lose track of the fact that the Federal Government is not the paramount body in the United States of America. In the Federal Government and its Judiciary does not repose the sovereignty, except to the extent that the states have given it to them. The sovereignty of the individual and of the states under the reserved powers concept (U.S. Constitution Articles IX and X) reposes not there but with the states, and the fact that the states do have this residuum of sovereignty makes theirs the responsibility of preserving that which remains.

It is beyond the authority of the courts of the United States to dictate to the sovereign legislatures of the several states the parameters of its debate. In giving birth to our Federation, the several states allowed and authorized the courts of the United States to pass upon the constitutional issues of the final product, the statutes which are enacted. But no where can be found the authority for the courts to dictate that which would be the subject of colloquy.

CONCLUSION

The Final Report of the President's Panel on Nonpublic Education (U.S. Gov. Print Office, Stock No. 1780-0972) made the following pertinent observations, at pages 28-29, concerning this Court's decision in *Lemon v. Kurtzman:*

> "In the Panel's view the full Court had an inadequate perception of realities in parochial schools because it failed to pierce the institutional veil. The entire focus was on the powers of the hierarchy, the role of the pastors, and the teaching commitment of religious; ignored were parents, teachers, and pupils who are now cut off from certain forms of public assistance.
>
> "Others have launched sharper critiques. One such criticism holds that, by judicial fiat, there is now a virtual disenfranchisement of religiously committed people with respect to public policy questions about which their churches have a strong position. They ask whether the civil rights of Lutherans or Jews or Quakers are to be

suppressed under the guise of 'no religious division' in the same way that the civil rights of Negroes were curtailed by a Supreme Court ruling (*Plessy v. Ferguson*, 1896) that 'separate but equal' treatment was necessary for peace and order. Finally, it might be noted that some constitutional lawyers feel the time has come to challenge the denial of benefits to nonpublic school students on grounds that educational appropriations are public welfare benefits which should not be restricted by religious conditions. The challenge should be mounted.

"Whatever legal opinions are involved, the Panel shares Mr. Justice White's minority statement that not only has the majority decision ignored the evidence in the Rhode Island case ('on this record there is no indication that entanglement difficulties will accompany the salary supplement program') but that—

> 'The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught . . . and enforces it, it is then entangled in the 'no entanglement' aspect of the Court's Establishment Clause jurisprudence.'

"Repercussions from this decision have been many. Michigan, Connecticut, and Ohio had plans to use State funds for teacher salary supplements, which have now been thwarted; plans for purchase of secular educational services in Illinois and New York have similarly fallen. Still to be decided are Maryland's scholarship plan, tax credit plans in Minnesota and Hawaii, and Illinois' multiple approach, which includes tuition vouchers for inner-city nonpublic school pupils.

"In summary, the law is still being molded and shaped by both judicial philosophies and political events so that the final phase in the Federal drama over nonpublic school education is still to be enacted."

It is submitted that Chapter 138 of the 1970 Laws of New York is such a constitutional enactment, consistent with and in

response to the guidelines set forth by this Court and the United States Constitution.

We contend that the majority decision of the District Court in this case fails to recognize the authority of the several states, under our Federal System, to legislate with respect to nonpublic school education. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Dated: August 16, 1972

Respectfully submitted,

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APPENDIX

Appendix A

Opinion of the District Court for the Southern District of New York, dated April 27, 1972

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

---

70 Civ. 3251

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, et al,

Plaintiffs,

against

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants,

and

CATHEDRAL ACADEMY, Albany, New York, ST. AMBROSE SCHOOL, Rochester, New York, BISHOP LOUGHLIN MEMORIAL HIGH SCHOOL, Brooklyn, New York, BAIS YAAKOV ACADEMY FOR GIRLS, Richmond Hill, New York, and YESHIVAH RAMBAM, Brooklyn, New York,

Intervenor-Defendants.

Before HAYS, Circuit Judge, PALMIERI and LASKER, District Judges

APPEARANCES:

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Appendix A

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Of counsel: PORTER R. CHANDLER, RICHARD E. NOLAN and JAMES W. B. BENKARD

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Attorneys for Intervenor-Defendants Bais Yaakov Academy for Girls and Yeshivah Rambam

LASKER, D. J.

We are called upon to determine the constitutionality of Chapter 138 of New York State's laws of 1970, which appropriates $28,000,000 to be paid to nonpublic schools for expenses incurred in complying with requirements of state law of which the principal are the testing of pupils and maintenance of attendance and health records.[1]

[1] The appropriation is to be paid to nonpublic schools "for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation." (Chap. 138 of the Laws of 1970).

Appendix A

In 1970 there were 850,000 students in nonpublic schools in New York. Chapter 138 includes the following legislative finding:

> "That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.
>
> "That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.
>
> "That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs."

Plaintiffs are taxpayers of New York and an unincorporated association whose members are New York residents whose objectives include opposition to use of public funds for the support of sectarian or religious schools. Defendants are the Commissioner of Education, who administers the statute, and the State Comptroller, who makes payment of the appropriated funds. Intervenors are Catholic and Jewish parochial schools who are beneficiaries of the Act.

The record contains defendants' and intervenors' answers to plaintiffs' interrogatories. No factual disputes exist.

Plaintiffs sue to enjoin the enforcement of the statute. Defendants move for judgment, claiming that the statute violates neither the federal nor the state constitution, and to dismiss the complaint on the ground that it raises a threshold question of violation of the constitution of the State of New York.

Appendix A

While we thus conclude that Chapter 138 violates the establishment clause of the First Amendment, it is proper for us to note our sympathetic awareness of the serious financial problems directly facing the parochial schools and, indirectly, the public. We recognize and appreciate the contribution which private schools have made financially and in providing that variety of approach to education which enriches community life. But the First Amendment, which has for two centuries assured the individual's right to worship as he chooses, protected the church from the impositions of the state, and immunized the national community against the ills of religious-political divisiveness, must be our guiding star.

A permanent injunction against the enforcement of the statute will be granted. The defendants' motions are denied.

Submit order on notice.

Dated: New York, New York
April 27, 1972

PAUL R. HAYS, C.J.
MORRIS E. LASKER, D.J.

Appendix A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

70 Civ. 3251

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, et al.,

Plaintiffs,

– against –

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants,

– and –

CATHEDRAL ACADEMY, Albany, New York, ST. AMBROSE SCHOOL, Rochester, New York, BISHOP LOUGHLIN MEMORIAL HIGH SCHOOL, Brooklyn, New York, BAIS YAAKOV ACADEMY FOR GIRLS, Richmond Hill, New York, and YESHIVAH RAMBAM, Brooklyn, New York.

Intervenor-Defendants.

Before HAYS, Circuit Judge, PALMIERI and LASKER, District Judges.

Dissenting opinion of PALMIERI, D.J.

PALMIERI, J.

I respectfully dissent. The statute under review is, in my opinion, a legitimate exercise of the duty of the state to assure that all children, regardless of the school they attend, receive adequate and full-time instructions in the secular subjects required by standards fixed by law. The private and parochial schools of New York State have been part of a single unitary system of education for many years and they have been under the jurisdiction of the Board of Regents since 1784.

Appendix A

I deplore the incalculable and irreversible harm which will be done by this decision. The statute invalidated by the majority decision is a reimbursement statute. It provides only a fractional reimbursement for the cost of record-keeping and testing by nonpublic schools and required of them by state law and regulation. The record is uncontested that the sums appropriated by the legislature to assure attendance and adequate examination procedures are much less than the schools expend for such purposes. This provides adequate assurance that government funds are not available for examination functions peculiar to religious institutions. To suggest otherwise is to let prejudice against education under religious auspices prevail over wise analysis.[1] It is a tragic symptom of our time that so simple an objective of a state legislature, simply implemented, should become a focus of objection by those who appear to share deep antipathies and fears with regard to secular education under religious auspices. One is impelled to ask whether the eyes of those who have such fears may be blinded by tragic conflicts now lost in history and which anteceded that of our own Constitution.

I am constrained to decline to participate in destroying this legislative act by judicial action. A vast majority of the legislature of the State of New York, and the Governor of that state, have determined that this partial reimbursement statute is a legitimate area of state concern and action, free of constitutional restraint. This court today undertakes the serious responsibility of overturning legislative findings of reasonableness. It takes this step notwithstanding the Supreme Court's statement in *Tilton v. Richardson*, 403 U.S. 672, 678 (1971), that

> "candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government

[1] This comment and those immediately following are not intended to reflect upon my esteemed colleagues but are directed to those who appear to be making a career of this type of destructive litigation.

activity in this sensitive area of constitutional adjudication"

and that "[j]udicial caveats against entanglement" are a "blurred, indistinct and variable barrier." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). It has long been held that separation of church and state cannot mean the absence of all contact. Beginning with state police and fire protection for churches, the theory of allowable contact has expanded with the reimbursement procedures in *Everson v. Board of Education*, 330 U.S. 1 (1947), the allocation procedure for free books in *Board of Education v. Allen*, 392 U.S. 236 (1968), and *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930), and the administrative relationships inherent in the tax exemption in *Walz v. Tax Commission of the City of New York*, 397 U.S. 644 (1970).[2] If, as the Supreme Court pointed out in *Allen, supra* at 247, a state "has a proper interest in the manner in which those [private] schools perform their secular educational function" then that interest is appropriately implemented here. I can perceive nothing in the decision of the Supreme Court in *Lemon v. Kurtzman* and *Earley v. DiCenso*, 403 U.S. 602 (1971), which requires the conclusions reached by the majority. There is neither entanglement nor involvement between church and state, let alone "the excessive government entanglement with religion" condemned in that case, *supra* at 613, and in *Walz, supra* at 674. Indeed, reimbursement for attendance and examination services duly performed by operation of law is clearly within the guidelines established by the Supreme Court in *Lemon-Earley* where it said (at page 616) that its "decisions from *Everson* [*supra*] to *Allen* [*supra*] have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials."

Accepting, as I believe we must, the basic premise that no perfect or absolute separation between religion and govern-

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[2] This language is borrowed substantially from P.O.A.U. v. *Essex*, 28 Ohio State 2d 79 (1971).

ment is really possible, see *Walz v. Tax Commission of the City of New York, supra* at 670, I agree partly with the views of Judge Oakes very recently expressed in the case of *Americans United for Separation of Church and State v. Oakey* (D.C. Vt., No. 6393, March 6, 1972) that we should "search for ways within the American system of public education that will preserve, indeed promote, the diversity of individual belief—religious, political and social—that, along with our Bill of Rights, distinguishes us so plainly from certain uniform, unified and uni-governed societies elsewhere in the world."

I would hold that this statute neither on its face nor as applied by the defendants is unconstitutional, and I would dismiss the complaint on the merits.

Dated: April 27, 1972

EDMUND L. PALMIERI, U.S.D.J.

Appendix B

Judgment of the District Court for the Southern District of New York, dated June 1, 1972

ORDER AND JUDGMENT

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70 Civ. 3251

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER AND HOWARD M. SQUADRON,

Plantiffs,

– against –

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants.

This action having come on to be heard on the merits before the Court, the Honorable Paul R. Hays, Circuit Judge, the Honorable Edmund L. Palmieri and the Honorable Morris E. Lasker, District Judges for the Southern District of New York, and after hearing arguments of counsel, the Court having rendered an opinion dated April 27, 1972, it is hereby

ORDERED AND ADJUDGED

1. That the defendants' motion to dismiss the complaint is denied.

2. Chapter 138 of the Laws of the State of New York of 1970 is hereby declared to be unconstitutional in violation of the First Amendment of the United States Constitution.

3. The defendants and their agents and all persons acting for or on behalf of the State of New York are permanently enjoined from making any payments or disbursements out of State funds pursuant to the provisions of Chapter 138 of the New York Laws of 1970, in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools.

4. The order and judgment of the Court filed on the 19th day of May, 1972, is hereby vacated.

Dated: New York, New York
June 1, 1972

PAUL R. HAYS, Circuit Judge
MORRIS E. LASKER, District Judge

Appendix C

Chapter 138 of the 1970 Laws of New York

AN ACT

To provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. It is hereby determined and declared as a matter of legislative finding:

That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

Nonpublic schools of the state are responsible for the education of more than 850,000 pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above-stated purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonably assisting such services.

Appendix C

§ 2. There shall be apportioned annually by the commissioner to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy, the amounts set forth below, out of funds appropriated therefor, for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation. The amount to be apportioned to each qualifying school in each school year shall be the sum of the following:

a. The product of fifteen cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades one through six; and

b. The product of twenty-five cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades seven through twelve.

The apportionment shall be reduced by one one-hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such reduction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinarily adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such

school was not in session because of a conference of teachers called by the principal of the school.

§ 3. In this act:

1. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils who are resident of the state during the base year divided by the number of days the school was in session during the base year; except that for the school year commencing July first, nineteen hundred seventy, the term "average daily attendance" means the total number of attendance days of such enrolled pupils during either September, October or November of such school year, as selected by the school, divided by the number of days such school was in session during such month.

2. "Base year" shall mean the school year immediately preceding the current year, except that for the school year commencing July first, nineteen hundred seventy, the base year shall be such school year, and any reduction in aid required for such base year by virtue of the failure to maintain the required total session shall be made in the apportionment in the subsequent school year.

3. "Commissioner" shall mean the state commissioner of education.

4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this chapter.

5. "Qualifying school" shall mean a nonprofit school in the state, other than a public school, which provides instruction in accordance with section thirty-two hundred four of the education law.

§ 4. Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this act.

§ 5. The amount to be apportioned to a school in any current year shall be paid in two installments, the first to consist of one-half of the estimated total apportionment and to be paid between January fifteenth and March fifteenth of such year, and the second to consist of the balance and to be paid between April fifteenth and June fifteenth of such year; provided that the commissioner may provide for later payments for the purpose of adjusting and correcting apportionments.

§ 6. Apportionments made for the benefit of any school which is not a corporate entity shall be paid, on behalf of such school, to such corporate body as may be designated for such purpose pursuant to regulations promulgated by the commissioner.

§ 7. The sum of twenty-eight million dollars ($28,000,000) or so much thereof as may be necessary, is hereby appropriated to the education department out of any monies in the state treasury in the general fund to the credit of the local assistance fund not otherwise appropriated, for the purposes of this act. Such sum shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner of education in the manner provided by law.

§ 8. Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction.

§ 9. Any school receiving aid pursuant to this act shall be subject to the provisions of section three hundred thirteen of the education law.

§ 10. This act shall take effect September first, nineteen hundred seventy.

Appendix D

Notice of Appeal of Appellant, Senator Earl W. Brydges, Filed July 14, 1972

70 Civ. 3251

FILED
U.S. DISTRICT COURT
JUL 14 954 AM '72
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER and HOWARD M. SQUADRON,

Plaintiffs,

– against –

NELSON A. ROCKEFELLER, as Governor of the State of New York, ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants,

– and –

CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL, BISHOP LOUGHLIN MEMORIAL HIGH SCHOOL, BAIS YAAKOV ACADEMY FOR GIRLS and YESHIVAH RAMBAM,

Intervenor-Defendants,

– and –

SENATOR EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

Intervenor-Defendant.

Appendix D

Notice of Appeal to the Supreme Court of the United States

SIRS:

Notice is hereby given that the above-named intervenor-defendant Senator Earl W. Brydges hereby appeals to the Supreme Court of the United States from the Final Order and Judgment entered in this action on June 1, 1972 permanently enjoining the "defendants and their agents and all persons acting for or on behalf of the State of New York . . . from making any payments or disbursements out of State funds pursuant to the provisions of Chapter 138 of the New York Laws of 1970, in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools", and from each and every part thereof.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
July 1, 1972

Yours, etc.
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Appendix D

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Appendix E

Order of the District Court for the Southern District of New York, dated June 29, 1972, Denying Motion to Stay Injunction

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

70 Civ. 3251

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, et al.,

Plaintiffs,

– against –

NELSON A. ROCKEFELLER, as Governor of the State of New York, ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants,

– and –

CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL, BISHOP LOUGHLIN MEMORIAL HIGH SCHOOL, BAIS YAAKOV ACADEMY FOR GIRLS and YESHIVAH RAMBAM,

Intervenor-Defendants,

– and –

EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

Intervenor-Defendant.

This action having come on to be further heard upon the motion of the Attorney General of New York on behalf of defendants Arthur Levitt, as Comptroller of the State of New York and Ewald B. Nyquist, as Commissioner of Education of

the State of New York dated June 12, 1972, and upon the motion of Messrs. Davis Polk & Wardwell, on behalf of the intervenor-defendants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School, dated June 5, 1972, and upon the motion of intervenor-defendant Earl W. Brydges made orally at a hearing before the Court on June 20, 1972, for an order suspending the injunction heretofore entered, pending the hearing and determining of the defendants' and intervenor-defendants' appeal to the United States Supreme Court from the judgment entered June 1, 1972, in this Court, and upon all the papers submitted in support of said motions and after hearing counsel for all parties, it is hereby:

ORDERED that said motions for an order suspending the injunction heretofore entered on June 1, 1972 be, and the same hereby are, denied, Judge Palmieri dissenting.

Dated New York, N. Y.
June 29, 1972

PAUL R. HAYS, U.S.C.J.
MORRIS E. LASKER, U.S.D.J.